MAYARIA SDN BHD & ANOR v. TENAGA NASIONAL BHD

HIGH COURT MALAYA, KUALA LUMPUR
S NANTHA BALAN JC
[CIVIL SUIT NO: 22NCVC-300-06-2014]
29 MAY 2015

UTILITIES: *Electricity – Charges for electricity – Claim for losses resulting from meter-tampering – Tampered meter rectified by Tenaga Nasional Bhd ('TNB') – Whether TNB can disconnect electricity supply upon user's failure to pay loss of revenue caused by tampering – Whether TNB's statutory right of disconnection ceases upon rectification of tampered meter – Electricity Supply Act 1990, ss. 37, 38(1)*

STATUTORY INTERPRETATION: *Construction of statutes – Purposive approach – Interpretation of s. 38(1) of Electricity Supply Act 1990 – Whether court can examine purpose and intent of statutory provision in its interpretation*

Tenaga Nasional Berhad ('TNB') is a licensee under the Electricity Supply Act 1990 ('the Act'). The first plaintiff was the owner of a hotel in Johor Bahru ('the hotel') to which TNB supplied electricity. The second plaintiff leased and operated the hotel and made payments of the electricity bills issued by TNB. On 30 July 2009, TNB's employees carried out an inspection of the meter installation at the premises of the hotel and discovered that there had been tampering of the meter resulting in the meter not properly recording the amount of electricity consumed by the hotel. This resulted in a lower calculation of the use of electricity than the actual usage. As per standard TNB practice, on the same day when the meter-tampering at the hotel was discovered, the TNB staff removed the impugned meter and replaced it with a new meter. Thereafter, the first plaintiff continued to be billed for electricity that was utilised as recorded by the new meter. TNB then recalculated the loss of revenue due to the under-billing of the hotel's account as a result of meter tampering at RM1,100,350.98. Thereafter, TNB issued a notice of demand dated 20 October 2009 ('the notice of demand') stating that unless the sum of RM1,100,350.98 was paid to TNB within 24 hours, the supply of electricity would be disconnected on 21 October 2009. Apart from the notice of demand, TNB also issued the statutory notice dated 20 October 2009 under s. 38(1) of the Act ('the notice of disconnection') which stated that the supply of electricity would be disconnected on 21 October 2009. The plaintiffs denied that there was any tampering of the meter but paid the sum of RM1,100,350.98 without prejudice to the rights of the hotel. By this suit, the plaintiffs challenged the validity of the notice of demand and the notice of disconnection and prayed for the refund of the sum of RM1,100,350.98. In response, TNB counterclaimed for a declaration that the said sum of RM1,100,350.98 was

paid by the plaintiffs for the loss of revenue which was lawfully claimed by TNB under s. 38(3) of the Act. The parties opted for a summary disposal under O. 14A of the Rules of Court 2012 with the following issues to be determined: (i) whether upon an inspection conducted by TNB's officials and discovery that an offence under s. 37 of the Act had been committed by reason of the unauthorised items being connected to the metering installation at the hotel and upon rectifying the metering installation, it was lawful for TNB to thereafter issue the notice of disconnection under s. 38(1) of the Act ('the first issue'); and (ii) whether upon a inspection conducted by TNB's officials and discovery that an offence under s. 37 of the Act had been committed by reason of the unauthorised items being connected to the metering installation at the hotel and upon removing the unauthorised items, it was lawful for TNB to invoke s. 38(3) of the Act and issue the notice of demand stating that unless the sum of RM1,100,350.98 was paid within 24 hours, the supply of electricity would be disconnected.

Held (allowing plaintiffs' claim with costs; dismissing defendant's counterclaim with no order as to costs):

(1) Once the impugned meter had been replaced and the offence under s. 37 of the Act was no longer extant, then there was no power to issue the notice to disconnect as the act of replacing the impugned meter with a new meter had brought the nefarious conduct or activity to an end and there was no longer a basis or justification for disconnection of electricity as a statutorily prescribed response to an offence under s. 37 of the Act; *Modernria Plastic Industries (M) Sdn Bhd v. Tenaga Nasional Bhd* (foll). (para 80)

(2) The interpretation that is to be placed on s. 38(1) of the Act cannot exclude an examination of the purpose and intent of the statutory provision. There is authority to support the purposive approach even in the absence of any ambiguity or conflict of meaning in the words appearing in a statutory provision; *Tenaga Nasional Bhd v. Ong See Teong & Anor* (refd); *Badan Peguam Malaysia v. Datuk Bandar Kuala Lumpur* (refd). (paras 84 & 85)

(3) The case of *Claybricks* and *WRP Asia* have both interpreted s. 38(1) of the Act as being a source of statutory power to enable TNB to swiftly take action to prevent the continuation of an offence under s. 37(1) of the Act. It is implicit from the judgments in both cases that the courts had arrived at these conclusions based on a purposive interpretation of s. 38(1) of the Act. The interpretation rendered by the courts in *Claybricks* and *WRP Asia* as to the purpose of the power in s. 38(1) of the Act is completely in tandem with the objective of that section which is to enable TNB to swiftly curb an offence which is continuing or which is still extant. The power to disconnect cannot be exercised by TNB

when the offence has already abated due to TNB's own standard procedure of replacing the tampered meter with the new meter. Hence, the first issue was answered in favour of the plaintiffs; *Modernria Plastic Industries (M) Sdn Bhd v. Tenaga Nasional Bhd* (foll). (paras 86 & 88)

(4) There is nothing in the statutory provisions that allow TNB to utilise the power of disconnection under s. 38(1) of the Act as a means to demand for payment of the amount which constitutes loss of revenue. If the loss of revenue is to be recovered, then that should be pursued by way of civil action in court in the ordinary way. Thus, the route that was taken by TNB to issue the notice of demand and demanding payment and threatening to disconnect the supply of electricity which is a statutory power under s. 38(1) of the Act, was not one which is permitted by the provisions of the Act. As such, the notice of demand, to the extent that it threatened the plaintiffs with disconnection of electricity in the event of non-payment, was bad in law. Hence, the second issue was also answered in favour of the plaintiffs. (paras 91 & 92)

Case(s) referred to:

Adil Juta Sdn Bhd v. Tenaga Nasional Bhd [2014] 1 LNS 1022 HC ***(refd)***
Andrew Lee Siew Ling v. United Overseas Bank (M) Bhd [2013] 1 CLJ 24 FC ***(refd)***
Badan Peguam Malaysia v. Datuk Bandar Kuala Lumpur [2013] 10 CLJ 130 HC ***(refd)***
Claybricks & Tiles Sdn Bhd lwn. Tenaga Nasional Bhd [2006] 4 CLJ 892 CA ***(dist)***
Goh Guan Seng v. Tenaga Nasional Bhd [2012] 1 LNS 735 HC ***(refd)***
Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd [2006] 3 CLJ 177 FC ***(refd)***
Modernria Plastic Industries (M) Sdn Bhd v. Tenaga Nasional Bhd [2015] 3 CLJ 825 HC ***(foll)***
Sri Bangunan Sdn Bhd v. Majlis Perbandaran Pulau Pinang & Anor [2007] 5 CLJ 673 FC ***(refd)***
Sumbang Projeks Sdn Bhd v. Tenaga Nasional Bhd [2014] 4 CLJ 323 CA ***(refd)***
Tan Yeong Kim lwn. Tenaga Nasional Bhd [2000] 8 CLJ 629 HC ***(refd)***
Tenaga Nasional Bhd v. Ong See Teong & Anor [2010] 2 CLJ 1 FC ***(refd)***
Vengadasalam v. Khor Soon Weng & Ors [1985] 1 LNS 46 SC ***(refd)***
Wong Pot Heng v. Zainal Abidin Putih & Anor [1990] 2 CLJ 174; [1990] 1 CLJ (Rep) 312 SC ***(refd)***
WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd [2012] 4 CLJ 478 FC ***(dist)***

Legislation referred to:

Electricity Supply Act 1990, ss. 13, 37(1), (3), (14), 38(1), (3), (4), (5),
Interpretation Acts 1948 and 1967, s. 17A
Rules of Court 2012, O. 14A

For the plaintiff - Kalearasu Veloo; M/s SF Chan & Co
For the defendant - Gurmel Singh; M/s Balvinder Singh Kenth

Reported by Amutha Suppayah

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JUDGMENT

S Nantha Balan JC:

Introduction

[1] Tenaga Nasional Berhad ("TNB") is the defendant in this action. They B are the sole provider of electricity in Peninsular Malaysia. I shall hereafter refer to the defendant as TNB. TNB is a licensee under the Electricity Supply Act 1990 ("the Act") and they have vast powers under the Act to take action in the event of offences committed under the Act. The Act criminalises theft or pilferage of electricity and any form of interference with TNB's C installations or meters and these are provided for under s. 37(1), (3) & (14) of the Act.

[2] Under the Act, upon inspection and discovery of such nefarious acts or offences under the Act, TNB has power to disconnect the supply of electricity to the consumer's premises upon giving the requisite statutory D notice.

[3] This case concerns the scope and limitations of TNB's statutory power under the Act in circumstances where there has been a determination by TNB that the meter installed at the consumer's premises has been tampered with resulting in the device recording a lesser amount of electricity than that E which has been actually consumed by the consumer and thereby leading to loss in revenue for TNB.

[4] The first issue that will be examined in this case is whether TNB can lawfully terminate the supply of electricity to the plaintiffs' premises F pursuant to s. 38(1) of the Act after discovery of a tampered meter at the plaintiffs' premises ("the impugned meter") and after the impugned meter has been replaced with a new meter.

[5] The second issue is whether TNB can lawfully invoke s. 38(3) of the Act and issue a notice of demand stating that unless the amount, which has G been calculated as loss of revenue (due to the impugned meter) is paid within 24 hours, the supply of electricity would be disconnected.

Statutory Provisions Under The Act

[6] The relevant statutory provisions for present purposes are s. 37(1), (3) & (14) and s. 38(1), (3), (4) & (5) of the Act. They provide as follows: H

Section 37(1), (3) & (14)

37(1). Any person who tampers with or adjusts any installation or part thereof or manufactures or imports or sells any equipment so as to cause or be likely to cause danger to human life or limb or injury to any I equipment or other property shall be guilty of an offence and for each such offence shall, on conviction, be liable to a fine not exceeding one hundred thousand ringgit or to imprisonment for a term not exceeding five years or to both.

...

(3) Any person who in any manner dishonestly:

(a) abstracts electricity;

(b) consumes electricity;

(c) uses electricity;

(d) alters the index of any meter or other instrument used on or in connection with any installation of any supply authority or any licensed installation for recording the output or consumption of electricity; or

(e) prevents any such meter or instrument from duly recording the output or consumption of electricity, shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding one hundred thousand ringgit or to imprisonment for a term not exceeding three years or to both.

...

(14) Any person who damages any meter or other instrument used on or in connection with any licensed installation for recording the output or consumption of electricity shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding two years or to both.

Section 38(1), (3), (4) and (5)

38(1). Where any person employed by a licensee **finds upon any premises evidence which in his opinion proves that an offence has been committed** under subsection 37(1), (3) or (14), the licensee or any person authorised by the licensee may, upon giving not less than twenty-four hours' notice, in such form as may be prescribed, cause the supply of electricity to be disconnected from those premises.

...

(emphasis added)

(3) The licensee may require the consumer to pay him for the loss of revenue due to the offence committed under section 37(1), 37(3) and 37(14) and any expenses incurred by the licensee under this section including expenses incurred in respect of the reconnection of electricity supply.

(4) A written statement by an employee of the licensee duly certified by the licensee or any person authorised by the licensee specifying:

(a) the amount of loss of revenue or the expenses incurred by the licensee; and

(b) the person liable for the payment thereof, shall be *prima facie* evidence of the payment that has to be made by the consumer under subsection (3);

(5) The amount stated in the written statement shall, within the period specified in the statement, be due and payable to the licensee and in default of payment such amount shall be recoverable by civil action in a court.

The Factual Matrix

[7] The factual matrix which has given rise to the issues in this case may be briefly stated as follows. The first plaintiff is a customer of TNB and is the owner of a hotel known as GoodHope Hotel ("the hotel") situated on the first plaintiff's premises located at PTD 19887, No 1, Jalan Ronggeng 5, Taman Skudai Baru, Skudai, 81300 Johor Bahru.

[8] Pursuant to a contract for the supply of electricity and the provisions of the Act, TNB supplies electricity to the hotel. At all material times, the second plaintiff leased and operated the hotel and made payments of the electricity bills issued by TNB. For convenience, I shall, wherever necessary refer to the first plaintiff and second plaintiff collectively as 'the hotel'.

Inspection By TNB

[9] On 30 July 2009, TNB's employees carried out an inspection of the meter installation at the premises of the hotel and as a result, discovered that there had been tampering of the meter. As a result of the tampering, the meter could not and did not properly record the amount of electricity which had actually been consumed by the hotel which resulted in a lower calculation of the use of electricity than the actual usage.

Replacement Of The Impugned Meter

[10] It is not in dispute that the standard practice of TNB is that upon discovery of tampering of the meter/theft of electricity, TNB will immediately replace the faulty/defective or tampered meter with a new meter. I may add that this case is not about the correctness or propriety of TNB's practice. I would go so far as to say that TNB is perfectly entitled to immediately replace the impugned meter with a new meter as this would immediately put a stop to the nefarious activity of meter tampering and theft of electricity.

[11] Hence, as per standard TNB practice, on the same day when the meter tampering at the hotel was discovered, the staff of TNB proceeded to dismantle and remove the impugned meter and replaced it with a new meter. Thereafter, the first plaintiff continued to be billed for electricity that was utilised as recorded by the new meter.

TNB's Recalculation

[12] In the meanwhile, TNB did a recalculation of the quantum for loss of revenue due to the under-billing of the hotel's account with TNB. According to TNB's recalculation, the loss of revenue due to the meter tampering was calculated to be RM1,100,350.98.

[13] The process of recalculation took some time. But this is quite understandable as there is a method that is involved in the process of recalculation. However, the methodology and/or the correctness of the recalculation process or the amount that has been recalculated is no longer the subject of dispute in this case.

TNB's Notice Of Disconnection/Demand For Payment

[14] After the process of recalculation had concluded, TNB issued a notice of demand dated 20 October 2009 ("the notice of demand") stating that unless the sum of RM1,100,350.98 (which had been calculated to be the loss of revenue due to the offence under s. 37 of the Act) is paid to TNB within 24 hours, the supply of electricity would be disconnected on 21 October 2009.

[15] Apart from the notice of demand, TNB also issued the statutory notice dated 20 October 2009 under s. 38(1) of the Act ("the notice of disconnection") which states that the supply of electricity would be disconnected on 21 October 2009.

[16] Both these notices were issued about two months and 20 days after the initial inspection and replacement of the impugned meter.

[17] It is not in dispute that when these notices were issues there was no longer any issue of meter tampering as that activity had already abated due to the replacement of the impugned meter with a new meter.

[18] The hotel responded swiftly. By its solicitors' letter dated 20 October 2009, the hotel denied that there was any tampering of the meter as stated in TNB's notice of disconnection and further refused to pay the sum of RM1,100,350.98 as demanded by TNB's notice of demand.

[19] By its letter dated 12 November 2009 to the solicitors of the hotel, TNB informed them they had strong evidence of meter tampering and justified the issuance of the notice of disconnection and the notice of demand for payment of RM1,100,350.98. Further, TNB gave notice to the hotel to settle the said sum within 14 days failing which TNB will disconnect the electricity supply to the hotel.

[20] Ultimately, the hotel paid the said sum of RM1,100,350.98 on 19 November 2009. The payment was made without prejudice to the rights of the hotel.

Plaintiffs' Claim And TNB's Counterclaim

[21] By this suit, the plaintiffs have challenged the validity of the notice of demand and the notice of disconnection and have prayed for the refund of the sum of RM1,100,350.98 which had been paid to TNB on 19 November 2009.

[22] In response, TNB has counterclaimed for a declaration that the said sum of RM1,100,350.98 was paid by the plaintiffs for the loss of revenue which was lawfully claimed by TNB under s. 38(3) of the Act.

[23] The matter was fixed for full trial. However, parties decided to opt for a determination of the case without a full trial and agreed that the case is to be determined under O. 14A of the Rules of Court 2012 on the basis that:

(a) the questions are suitable for determination without a full trial of the action; and

(b) such determination will finally determine the entire cause or matter or any claim or issue therein.

The Agreed Issues

[24] The agreed issues to be determined for summary disposal of this suit under O. 14A of the Rules of Court 2012 are as follows:

First Issue

(a) Whether upon an inspection conducted by TNB's officials on 30 July 2009 and discovery by the said officials that an offence under s. 37 of the Electricity Supply Act 1990 ("the Act") had been committed by reason of the unauthorised items being connected to the metering installation at the first plaintiff's premises known as GoodHope Hotel and upon immediate removal of the unauthorised items by the said officials and thereby rectifying the metering installation, it is lawful for TNB to thereafter issue the notice of disconnection under s. 38(1) of the Act which states that the supply of electricity would be disconnected on 21 October 2009.

Second Issue

(b) Whether upon an inspection conducted by TNB's officials on 30 July 2009 and discovery by the said officials that an offence under s. 37 of the Act had been committed by reason of the unauthorised items being connected to the metering installation at the first plaintiff's premises known as GoodHope Hotel and upon immediate removal of the unauthorised items by the said official, it is lawful for TNB to invoke s. 38(3) of the Act and issue the notice of demand stating that unless the sum of RM1,100,350.98 (as loss of revenue due to the offence under s. 37 of the Act) is paid to TNB within 24 hours, the supply of electricity would be disconnected on 21 October 2009.

[25] The parties agreed that if the plaintiffs succeed on either one of the issues, then judgment is to be given in favour of the plaintiffs and the counterclaim is to be dismissed. Hence, for TNB to succeed, both issues would have to be determined in their favour. The parties had also agreed that they would rely upon the following documents:

(i) TNB's notice of disconnection under s. 38(1) of the Electricity Supply Act 1990 (borang A) (pp. 143 & 145 of bundle B) stating that electricity supply to the plaintiffs' premises would be discontinued on 21 October 2009 (annexure 1); and

(ii) TNB's notice of demand under s. 38(3) of the Electricity Supply Act 1990 dated 20 October 2009 demanding from the first plaintiff the payment of RM1,100,350.98 within 24 hours failing which, electricity supply shall be discontinued by TNB (p. 142 of bundle B) (annexure 2).

Plaintiffs' Argument

[26] It was contended for the plaintiffs that TNB cannot terminate electricity by issuing a notice under s. 38(1) of the Act (borang A) on 20 October 2009 when the alleged tampering had been rectified on 30 July 2009 and electricity was continued to be supplied thereafter. It was contended that the notice of disconnection issued under s. 38(1) of the Act was unlawful and void.

[27] In the present case, counsel for the plaintiffs placed great reliance on the observations which I had made in a somewhat similar case which is reported as *Modernria Plastic Industries (M) Sdn Bhd v. Tenaga Nasional Bhd* [2015] 3 CLJ 825 HC ("Modernria") where I dealt with the question as to whether a notice (to disconnect the supply of electricity) under s. 38(1) of the Act can be issued when the offence of tampering/pilferage of electricity under s. 37(1), (3), and (14) of the Act is no longer extant.

[28] In *Modernria*, the plaintiff filed an application to seek an interim injunction to restrain TNB from disconnecting electricity supply to the consumer's premises pending disposal of the action.

[29] In that case, TNB conducted an inspection at the consumer's premises and discovered that there was tampering of TNB meter. TNB had in accordance with its usual practice, replaced the tampered meter with a new meter. About two and a half months later, TNB issued the "notis pemotongan bekalan elektrik di bawah s. 38(1) Akta Bekalan Elektrik 1990" dated 20 August 2014 to disconnect the electricity supply on 21 August 2014. By the said notice, the consumer was informed that an offence had been committed under s. 37(1) of the Act and that the supply of electricity would be disconnected on 21 August 2014.

[30] Consequently, the consumer expeditiously filed an application for an interim injunction to restrain TNB from disconnecting supply of electricity to the consumer's premises pending disposal of the action.

[31] In the present case, counsel for the plaintiffs referred in particular to paras. 31, 32 and 33 of *Modernria* which read as:

> 31. Counsel for TNB says that it is standard procedure that upon discovery of tampering of the meter/ theft of electricity that TNB will immediately replace the faulty or defective (tampered) meter with a new

meter. If that is the case then it means that by installing a new meter, TNB will be necessarily depriving itself of the ability to disconnect the supply of electricity as there would be no further illegal consumption of electricity. In my view, *it would be a strain of language of Section 38(1) of the Act if it were to be read as allowing future disconnection of electricity (at any time as TNB may chose) in circumstances where the offence under Section 37(1) of the Act was in the past and is no longer being perpetuated.*

32. The purpose of Section 38(1) of the Act has already been lucidly explained by the Court of Appeal and Federal Court in the *Claybricks* and *WRP Asia Pacific* cases respectively and it is clear that it is a statutory power given to TNB to swiftly disconnect after discovery of an offence, *but at that point in time when the supply of electricity is being disconnected, the offence must still be continuing. I am not convinced that Section 38(1) of the Act can be utilised in circumstances where the offence is no longer continuing as there is no illegal consumption or usage of electricity which has to be severed.*

33. As such, I am of the view that on the facts of this case, there is no longer any continuation or perpetuation of any offences under the Act which entitles TNB to use its power under Section 38(1) of the Act to disconnect electricity to the said premises. Hence, *any such exercise of power by TNB under Section 38(1) of the Act in these circumstances would in my view would be an unlawful use of statutory power by TNB ...*

(emphasis added)

[32] Counsel for the plaintiffs took the position that based on the above decision, the notice of disconnection is bad in law because as at 20 October 2009, there was no subsisting offence under s. 37 of the Act at the premises of the hotel. It was submitted that based on the facts of this case, s. 38(1) of the Act cannot be used by TNB to disconnect the supply of electricity to the hotel.

[33] It was also submitted for the plaintiffs that the decision of the Court of Appeal in *Claybricks & Tiles Sdn Bhd lwn. Tenaga Nasional Bhd* [2006] 4 CLJ 892 CA ("Claybricks") makes it amply clear that s. 38 of the Act is only intended to safeguard TNB's position in order for TNB to act swiftly to abate the wrongdoing such as theft of electricity.

[34] In particular counsel for the plaintiffs relied upon the following passage in *Claybricks* where the Court of Appeal had held that:

... Dalam hal perkara ini kami lebih cenderung untuk menerima dan bersetuju dengan tafsiran dan pandangan yang dibuat dalam kes *Tan Yeong Kim lwn. Tenaga Nasional Berhad* [2000] 3 MLRH 413; [2000] 8 CLJ 629; [2000] 4 AMR 4817 di mana YA Hakim Alauddin Mohd. Sheriff (YA pada masa itu) telah menyatakan antara lain bahawa s. 38(1) Akta tersebut tidak memerlukan satu pembuktian kesalahan oleh mahkamah sebagai pra-syarat sebelum kuasa pemotongan dapat dilaksanakan oleh TNB sebagai pemegang lesen. Seterusnya YA Hakim menyatakan *ianya digubal sebegitu rupa untuk memberi kuasa efektif kepada TNB memberhentikan dengan segera sebarang kesalahan yang berlaku dan tidak dibiarkan berlarutan.*

> … Kami berpendapat *s. 38(1) Akta tersebut TNB dan membolehkan TNB bertindak cepat dan dengan itu dapat mencegah penyalahgunaan seperti pencurian bekalan elektrik yang dibekalkan oleh TNB* …
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> (emphasis added)

[35] Counsel submitted that this interpretation was affirmed by the Federal Court in *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* [2012] 4 CLJ 478 FC ("WRP Asia") where it was held that s. 38 of the Act gave effective powers to TNB to instantly prevent any offence that may be committed and not be left unattended or unabated. Counsel emphasised that in *WRP Asia*, the Federal Court confirmed the statement made by His Lordship Justice Zulkefli Ahmad Makinudin JCA (as he then was) in *Claybricks* and stated as follows:

> …
>
> [8] Zulkefli Ahmad Makinudin JCA also elaborated that s. 38(1) of the Act was enacted to give effective powers to TNB to instantly prevent any offence that may be committed and not be left unattended or unabated. It provided specifically for the preservation of TNB's interest and empowers TNB to act expeditiously, thereby preventing misuse such as theft of electricity supplied by TNB.

[36] It was therefore submitted for the plaintiffs that the whole purpose of s. 38(1) of the Act as explained in *Claybricks* and *WRP Asia* is to give statutory power to TNB to swiftly disconnect upon discovery of the offence and prevent further misuse or losses to TNB. It was accordingly submitted for the plaintiffs that when the notice of disconnection was served on the plaintiffs, there was no longer any defective meter or offending device to facilitate the perpetuation of offence of theft of electricity because remedial work was carried out by TNB and completed on 30 July 2009.

[37] Therefore, after the rectification on 30 July 2009, there was no issue of any offence being committed under s. 37 of the Act since the supply of electricity to the plaintiff's premises was properly and accurately recorded thereafter and the plaintiffs had duly paid those electricity bills.

[38] In so far as the notice of demand under s. 38(3) of the Act (requiring that the loss of revenue be paid within 24 hours) is concerned, the issue at hand to be determined is whether the notice of demand is bad in law as TNB had sought to obtain payment from the plaintiff by threatening to use its rights under s. 38(1) of the Act to disconnect electricity supply in the event of non-payment instead of filing a civil action under s. 38(5) of the Act.

[39] It was contended for the plaintiffs that the provisions under s. 38(3), (4) and (5) of the Act are separate from s. 38(1) of the Act and as such, TNB cannot use its rights under s. 38(1) of the Act to threaten the plaintiffs to pay the sum demanded under s. 38(3) of the Act, failing which, electricity supply will be disconnected.

[40] Hence, as for the second issue posed for determination, it was further submitted that it is not lawful for TNB to issue the notice of demand under s. 38(3) of the Act and demand that the sum of RM1,100,350.98 be paid within 24 hours, failing which, TNB shall disconnect electricity supply to the plaintiff's premises.

TNB's Argument

[41] On the other hand, counsel for TNB took the position that s. 38(1) of the Act is clear and unambiguous and must be read literally and that it would be impermissible to look at the purpose of the statutory provision as an aid to interpretation. As such, it was contended that effect must be given to it so as to authorise TNB's conduct in issuing the notice for disconnection well past the date of discovery of the tampering and well after the act of meter tampering had abated (by TNB's action in replacing the impugned meter with a new meter.

[42] Counsel said that an interpretation based on a purposive approach to s. 38(1) of the Act is unwarranted and would stultify TNB's powers to curb the nefarious activity of meter tampering in and around the country.

[43] Counsel for TNB referred to several authorities on statutory interpretation. I shall refer to some of the significant cases. Counsel's starting position is that in construing a statute the duty of the court is limited to interpreting the words used by the Legislature and to give effect to the words used by it. He submitted that the court is not entitled to read words into a statute unless clear reason for it is to be found in the statute itself. (See: *Sri Bangunan Sdn Bhd v. Majlis Perbandaran Pulau Pinang & Anor* [2007] 5 CLJ 673 FC).

[44] He further referred to *Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd* [2006] 3 CLJ 177 FC, where the Federal Court held that:

> Thus when the language used in a statute is clear effect must be given to it. As Higgins Jz said in *Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd* [1920] 28 CLR 129 at pp. 161-162:
>
> > The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it, and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means in its ordinary and natural sense it is our duty to obey that meaning even if we think the result to be inconvenient, impolite or improbable.
>
> The primary duty of the court is to give effect to the intention of the Legislature as expressed in the words used by it and no outside consideration can be called in aid to find another intention (see *Nathu Prasad v. Singhai Kepurchand* [1976] Jab LJ 340). Thus the duty of the court, and its only duty, is to expound the language of a statute in

accordance with the settled rules of construction and has nothing to do with the policy of any statute which it may be called upon to interpret (see *Vacher & Sons Ltd v. London Society of Compositors* [1913] AC 117; *NKM Holdings Sdn Bhd v. Pan Malaysia Wood Bhd* [1987] 1 MLJ 39).

[45] Next, reference was made to *Vengadasalam v. Khor Soon Weng & Ors* [1985] 1 LNS 46; [1985] 2 MLJ 449 FC where Abdoolcader SCJ said:

> We would in this regard also advert to the decision of the House of Lords in *Thompson v. Goold & Co.* where Lord Mersey said in his speech (at page 420): "It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do." Even more pertinent perhaps would be the speech of Lord Loreburn, LC in *Vickers, Sons and Maxim, Limited v. Evans* when he said (at page 445):
>
> > My Lords, this appeal may serve to remind us of a truth sometimes forgotten, that this House sitting judicially does not sit for the purpose of hearing appeals against Acts of Parliament, or of providing by judicial construction what ought to be in an Act, but simply of construing what the Act says. We are considering here not what the Act ought to have said, but what it does say; …
> >
> > The appellant's contention involves reading words into this clause. The clause does not contain them; and we are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself.
>
> (See: page 450 -451 of the judgment)

[46] Hence, it was submitted for TNB that the clear language of s. 38(1) of the Act in its literal and ordinary meaning, envisages only two pre-conditions for TNB to invoke the statutory power conferred under the said section to disconnect supply of electricity. These conditions are:

(a) TNB's employee had discovered evidence in the premises which in his opinion proves that an offence has been committed under subsection 37(1), (3) or (14) of the Act: and

(b) TNB had issued a 24 hours notice to disconnect the electricity supply.

[47] Counsel for TNB further submitted that the language of s. 38(1) of the Act is unambiguous and that as long as there is a discovery by TNB's employee in any premises of any evidence of offence committed under s. 37(1), 37(3) or 37(14) of the Act and the documentation requirements envisaged in the Act have been fulfilled, then TNB has every right to exercise the power conferred to it under s. 38(1) of the Act to disconnect the supply of electricity.

[48] Counsel for TNB said that by asserting that TNB could only exercise its statutory powers conferred under s. 38(1) of the Act to disconnect electricity before rectification of the tampering, the court in *Modernria* had read into the Act words which are not there.

[49] According to counsel, the pre-requisite for the exercise of TNB's power under s. 38(1) of the Act was considered by the High Court in *Goh Guan Seng v. Tenaga Nasional Berhad* [2012] 1 LNS 735 HC where it was held that:

> In construing a statute effect must be given to the object and intent of the legislature in enacting the statute. *Accordingly, the duty of the court is limited to interpreting the words used by the Legislature and to give effect to the words used by it. The court will not read words into a statute unless clear reason for it is to be found in the statute itself.* (see *NKM Holdings Sdn Bhd v. Pan Malaysian Wood Bhd* [1987] 1 MLJ 39 (SC); *Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai Kg Sdn Bhd v. Fawziah Holdings Sdn Bhd* [2006] 4 MLJ 113 (FC); *Vengadasalam v. Khor Soon Weng & Ors* [1985] 2 MLJ 449 (SC); *Sri Bangunan Sdn Bhd v. Majlis Perbandaran Pulau Pinang & Anor* [2007] 6 MLJ 581 (FC)).
>
> *Therefore, in construing any statutes, the Court will firstly, look at the words in the legislation and apply the plain and ordinary meaning of the words in the statute.* If there is any ambiguity to the words used, the Court is duly bound to accept it even if it may lead to mischief. *But where the language used is clear and unambiguous, it is not the function of the Court to re-write the statute in a way which it considers reasonable.* But if the words employed are not clear, then the Court may adopt the purposive approach in construing the meaning of the words used (see *PP v. Tan Tatt Eek & other appeals* [2005] 1 CLJ 713; *Megat Najmuddin bin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385; [2002] 1 CLJ 645; *Chin Choy & Ors v. Collector of Stamp Duties* [1979] 1 MLJ 169; *Yeo Peck Chie v. KS Gill & Co* [1946] MLJ 131; *Maror & St Mellons Rural District Council v. Newport Corporation* [1952] AC 189 (HL); *Woodward v. Watt* [1853] 2 E & B 452; and *Warburton v. Loveland* [1932] 2 D & CL (HL)480).
>
> *Section 38 ESA 1990 is a provision dealing with the disconnection of the supply of electricity. It provides that TNB may upon giving the requisite notice, disconnect electricity supply to a consumer premises. The power to disconnect the supply of electricity is premised upon the finding of evidence which in the opinion of a TNB employee proves that the meter installation has been unlawfully tampered or adjusted with. The key words under subsection (1) of s. 38 ESA 1990 are 'which in his opinion' proves that an offence has been committed. The words employed in this subsection are quite clear and unambiguous. The legal requirement is satisfied once a TNB employee finds evidence, which in his opinion proves that an offence has been committed under subsections (1), (3) and (14) of s. 37.* In other words, the opinion of a TNB employee that an offence has been committed is sufficient to justify TNB in exercising its powers of disconnection of supply of electricity under s. 38.

[50] It was pointed out by counsel for TNB that the courts have on several occasions held that s. 38(1) of the Act is clear and unambiguous and therefore should be given its literal and ordinary meaning. (See: *Claybricks & Tiles Sdn Bhd v. Tenaga Nasional Bhd* [2006] 4 CLJ 892 CA & *Tan Yeong Kim lwn. Tenaga Nasional Bhd* [2000] 8 CLJ 629 HC).

[51] TNB's position is that the plain and precise words of s. 38(1) of the Act called for a literal and strict construction to be given to this provision. It was submitted that the significance of the fact that s. 38 is found within Part IX of the Act under the heading of offence and penalties could not be lightly dismissed either.

[52] In amplification, it was submitted for TNB that canons of interpretation of a statutory provision, including purposive reading, can only be availed of where the terms or words employed in the statutory provision created a doubt and the court had to opt for one meaning to the exclusion of another. According to counsel, the purposive approach to the interpretation of a legislation only applies where any doubt arises from the terms or words employed by the Legislature.

[53] Hence, it was contended for TNB that where the words are precise and unambiguous, then the literal and strict rule of construction should apply. (*Wong Pot Heng v. Zainal Abidin Putih & Anor* [1990] 2 CLJ 174; [1990] 1 CLJ (Rep) 312 SC).

[54] Counsel for TNB finally referred to the case of in *Andrew Lee Siew Ling v. United Overseas Bank (Malaysia) Bhd [2013] 1 CLJ 24*; [2013] 1 MLJ 449 FC, where the Federal Court examined s. 17A of the Interpretation Acts 1948 and 1967 which provides for a purposive approach in the interpretation of statutes. YAA Tan Sri Zulkefli bin Makinuddin CJ (Malaya) speaking for the Federal Court at pp. 35 to 36 (CLJ); pp. 457 to 458 (MLJ) said:

> Section 17A of the Interpretation Acts provides that:
>
> > A construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act of not) shall be preferred to a construction that would not promote the purpose or object.
>
> On the proper application of the provision of the said s. 17A of the Interpretation Act we would refer to the case of *All Malayan Staff Union v. Rajasegaran & Ors* [2006] 6 MLJ 97 wherein the court had laid down the principles, *inter alia*, as follows:
>
> > In summarising the principles governing the application of the purposive approach to interpretation, *Craies on Legislation* (8th Ed), says at p. 566:
> >
> > (1) Legislation is always to be understood first in accordance with its plain meaning.
> >
> > (2) Where the plain meaning is in doubt the court will start the process of construction by attempting to discover, from the provisions enacted, the broad purpose of the legislation.
> >
> > (3) Where a particular reading would advance the purpose identified, and would do no violence to the plain meaning of the provisions enacted, the courts will be prepared to adopt that reading.

(4) Where a reading would advance the purpose identified but would strain the plain meaning of the provisions enacted, the results will depend on the context and, in particular, on a balance of the clarity of the purpose identified and the degree of strain on the language.

(5) Where the courts conclude that the underlying purpose of the Legislation is insufficiently plain, or cannot be advanced without any unacceptable degree of violence to the language used, they will be obliged, however regretfully in the circumstances of a particular case, to leave to the legislature the task of extending or modifying the legislation.

The choice prescribed in s. 17A of '… a construction that would promote the purpose or object underlying the Act … shall be preferred to a construction that would not promote that purpose or object…' can only arise when the meaning of a statutory provision is not plain and is ambiguous. If therefore, the language of a provision is plain and unambiguous s. 17A will have no application as the question of another meaning will not arise. Thus, it is only when a provision is capable of bearing two or more different meanings can s. 17A be resorted to in order to determine the one that will promote the purpose or object of the provision. Such an exercise must be undertaken without doing any violence to the plain meaning of the provision. This is a legislative recognition of the purposive approach and is in line with the current trend in statutory interpretation. The principles set out in the preceding paragraphs will therefore be relevant to the operation of s. 17A.

[55] However, counsel for the plaintiffs on the other hand drew the attention of the court to the decision of the Federal Court in *Tenaga Nasional Bhd v. Ong See Teong & Anor* [2010] 2 CLJ 1 FC where the court had to deal with an interpretation concerning s. 13 of the Act and submitted that the purposive approach to interpretation can be resorted to even where there is no ambiguity. The following passages in that judgment appear to support the proposition:

[6] This raises the question of whether the meaning of the word "upgrading" in s. 13 of the Act is capable of being restricted in order to avoid the hardship. That brings into focus s. 17A of the Interpretation Acts 1948 of 1967 ("s. 17A") which reads as follows:

In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

It is thus abundantly clear that what must prevail is a construction that will promote the purpose of an Act. In this regard useful reference may be made to *Mills v. Meeking* [1990] 91 ALR 16 where Dawson J in explaining s. 35(a) of the Interpretation of Legislation Act of Victoria which is similar to s. 17A said at pp. 30 - 31:

> The literal rule of construction, whatever the qualifications with which it is expressed, must give way to a statutory injunction to prefer a construction which would promote the purpose of an Act to one which would not, especially where that purpose is set out in the Act. Section 35 of the Interpretation of Legislation Act must, I think, mean that the purposes stated in Pt 5 of the Road Safety Act are to be taken into account in construing the provisions of that Part, *not only where those provisions on their face offer more than one construction, but also in determining whether more than one construction is open.* The requirement that a court look to the purpose or object of the Act is thus more than an instruction to adopt the traditional mischief or purpose rule in preference to the literal rule of construction. The mischief or purpose rule required an ambiguity or inconsistency before a court could have regard to purpose: *Miller v. Commonwealth* [1904] 1 CLR 668 at 674; *Wacal Developments Pty Ltd v. Realty Development Pty Ltd* [1978] 20 ALR 621 at 630. *The approach required by s. 35 needs no ambiguity or inconsistency; it allows a court to consider the purposes of an Act in determining whether there is more than one possible construction.* Reference to the purposes may reveal that the draftsman has inadvertently overlooked something which he would have dealt with had his attention been drawn to it and if it is possible as a matter of construction to repair the defect, then this must be done. However, if the literal meaning of a provision is to be modified by reference to the purposes of the Act, the modification must be precisely identifiable as that which is necessary to effectuate those purposes and it must be consistent with the wording otherwise adopted by the draftsman. Section 35 requires a court to construe an Act, not to rewrite it, in the light of its purposes.

In commenting on provisions similar to s. 17A in the *Australian States Statutory Interpretation in Australia* by Pearce and Geddes 4th edn says at p. 27:

> In the author's opinion, however, s. 15 AA requires the purpose or object to be taken into account if the meaning of the words, interpreted in the context of the rest of the Act is clear. When the purpose or object is brought into account, an alternative interpretation of the words may become apparent. And if one interpretation does not promote the purpose or object of an Act and another interpretation does so, the latter interpretation must be adopted.

[56] Counsel for TNB said that the interpretation of s. 38(1) of the Act that was adopted in *Modernria* will render the said section practically superfluous especially in cases of non-permanent tampering. The case of *Sumbang Projeks Sdn Bhd v. Tenaga Nasional Bhd* [2014] 4 CLJ 323 CA was referred to as an example of a non-permanent tampering.

[57] In that case, the facts showed that TNB conducted an inspection at TNB's factory during which a 'clamp' was discovered attached to the bottom of the test terminal block. The clamp, which was a rectangular device was

not part of TNB's original meter installation and should not have been there. It was discovered that the 'clamp' could be easily inserted and removed from the test terminal block without breaking the meter installation seal. The purpose of the 'clamp' was to interfere with the electricity meter by deviating electricity current away from the meter recording device that had been installed there and to obstruct the said meter from recording the accurate flow of electricity. The result showed a discrepancy of -92.61% on the first reading and -98.89% on the second reading.

[58] Counsel said that in such a situation, TNB's employee would have to take immediate measures to remove the clamp during the inspection because otherwise the clamp would be conveniently removed subsequently by the customer itself to normalise the meter reading. Thus, if the customer were to remove the clamp, there would no longer be any visible evidence of any offences under the Act which would entitle TNB to use its power under s. 38(1) of the Act to disconnect electricity to the said premises.

[59] Counsel pointed out that this is what exactly happened in *Adil Juta Sdn Bhd v. Tenaga Nasional Berhad* [2014] 1 LNS 1022 HC. In that case, TNB's employees had gone to the plaintiff's ponds to conduct a meter inspection. As a result of the inspection, TNB's team found that there was evidence that the meter had been tampered with.

[60] TNB's team decided to return later to take the necessary corrective action but when the team arrived later on the same day, they were refused entry by the plaintiff's workers and were asked to come back four days later to carry out the corrective action.

[61] The TNB's team returned to the same premises as scheduled to carry out the corrective action. However upon further examination, they found that the plaintiff had removed the meter which was previously discovered to have been tampered with. It was during this corrective process that TNB's employees had discovered that the plaintiff had rectified the tampering of the meter and normalised the meter reading.

[62] Thus, following the approach taken by the court in *Modernria*, the disappearance of evidence would lead to a situation where there would no longer be a perpetuation of any offences under the Act which would have entitled TNB to use its power under s. 38(1) of the Act to disconnect electricity to the said premises.

[63] Thus, counsel for TNB submitted that the alternative would be for TNB to make all the necessary arrangements to continuously keep watch over each and every tampered metering installation in the country - without taking any corrective measures and thereby doubly rewarding the offending customers by letting them to continue to perpetuate theft of electricity unabated until determination is made by TNB's officers whether or not to proceed with issuance of the notices to disconnect electricity supply.

[64] Counsel was at pains to point out that this would not only render s. 38(1) of the Act practically superfluous but will also increase costs that will only be passed on to the other consumers. It would not be fair to penalise the other consumers by having to pay higher costs because of the acts of those who try to benefit from the tampering with the meters.

[65] Counsel referred to *Modernria* where the court held that TNB cannot lawfully utilise s. 38(1) of the Act in circumstances where the tampering of meter installation had already been corrected and implored upon this court to revisit that conclusion on the basis of what has been described by counsel as the rationale for the issuance of the notice of disconnection which had apparently been approved by the decisions in *Claybricks* and *WRP Asia*.

[66] In this regard, the following passage in *Claybricks* was referred to:

> Kami berpendapat s. 38(1) Akta tersebut telah diperuntukkan secara spesifik untuk menjaga kepentingan TNB dan membolehkan TNB bertindak cepat dan dengan itu dapat mencegah penyalahgunaan seperti pencurian bekalan elektrik yang dibekalkan oleh TNB.

[67] The following passage from the judgment of the Federal Court in *WRP Asia* was also referred to:

> TNB's Section 38 notice to disconnect the electricity supply for offences in s. 37 need not prove the offences in court. The reason is that, any purported act to review such act will defeat the swift enforcement under the Act where electricity supply needs to be severed immediately to avoid further illegal usage by the perpetrator.

[68] It was also submitted that the court in *Modernria* had not considered the fact that in *Claybricks* inspection was conducted by TNB before 7 December 2004 but the notice to disconnect electricity under s. 38(1) of the Act was only issued on 12 May 2005 after the plaintiff failed to settle the under billing charges demanded by TNB and the Court of Appeal nevertheless held that the notice was lawfully issued by TNB.

[69] Similarly, in *WRP Asia*, inspection was conducted by TNB on 13 November 2009 and the notice to disconnect electricity under s. 38(1) of the Act was only issued on 22 January 2010 upon the plaintiff's failure to settle the under billing charges demanded by TNB and the Federal Court similarly held that the notice was lawfully issued by TNB.

[70] The decision of the High Court in *Tan Yeong Kim* was accepted and followed by the Federal Court in *Claybricks*. In that case, inspection was carried out by TNB on 17 March 1998 and the notice to disconnect electricity under s. 38(1) of the Act was only issued after the plaintiff failed to settle the under billing charges demanded by TNB by its notice dated 13 July 1998. The High Court held that the notice was lawfully issued by TNB.

[71] Therefore, it was submitted that the Court of Appeal and Federal Court in *Claybricks* and *WRP Asia* construed the rational for issuance of a notice to disconnect electricity by TNB in a wider context which includes curbing/preventing any abusive usage of electricity in general.

[72] The second issue concerns the validity of the notice of demand which was issued under s. 38(3) of the Act which states that unless the sum of RM1,100,350.98 (as loss of revenue due to the offence under s. 37 of the Act) is paid to TNB within 24 hours, the supply of electricity would be disconnected on 21 October 2009.

[73] First counsel for TNB referred to s. 38(3) of the Act which states as follows:

> The licensee may require the consumer to pay him for the loss of revenue due to the offence committed under subsections 37(1), (3) and (14) and any expenses incurred by the licensee under this section including expenses incurred in respect of the reconnection of electricity supply.

[74] Counsel for TNB emphasised that the plaintiffs are not disputing the sum of RM1,100,350.98 claimed by TNB as loss of revenue as a result of the tampering of meter installation which was discovered by TNB's employees on 30 July 2009 at the hotel.

[75] Counsel submitted that the Court of Appeal and Federal Court, in *Claybrick* and *WRP Asia* respectively had upheld the validity of the similar notices which were issued by TNB in those cases.

[76] In *WRP Asia*, TNB issued a notice to disconnect (form A) dated 22 January 2010 together with a letter of demand also dated 22 January 2010 to demand a sum of RM5,485,463.87 as under-billing charges pursuant to s. 38 of the Act. Through the letter, the appellant was instructed to pay that amount within 14 days, failing which the electricity supply would be disconnected. The Federal Court held that:

> The respondent here had established a private relationship with the appellant when they mutually signed a contract of supply. This relationship thus was commerce-based, with the appellant as the consumer, and the respondent the energy supplier company. The respondent would expect the appellant to keep its part of the bargain by not tampering with the electricity meter that would cause losses to it ...
>
> Let us now scrutinise the letter. Even though the effect of the letter is quite harsh, s. 38 of the Act empowers the respondent to discontinue the supply of electricity based on the subjective finding of its employee if any offence has been found committed under ss. 37(1), 37(3) or 37(14). Despite holding the status of being the only supplier of electricity in the country the respondent has clearly complied with all the necessary statutory requirements. It served the appellant not only with the letter of 22 January 2010 but also the two documents, documentations which are necessary prerequisites under the Act.

[77] In *Claybricks*, TNB issued a notice to disconnect on 12 May 2005 and informed the appellant that unless a sum of RM1,723,304.17 is paid within 14 days, TNB will disconnect the supply of electricity to the appellant's premises. The Court of Appeal held that:

> Adalah pandangan kami perayu tidak boleh mempersoalkan kuasa yang diberikan kepada responden berhubung pemotongan bekalan elektrik dan seterusnya kuasa responden menuntut bayaran-bayaran yang dikenakan terhadap perayu apabila responden telah membuat kiraan semula jumlah penggunaan elektrik yang sebenarnya.

Conclusion

[78] It is obvious that counsel for the plaintiffs and TNB stand on opposite sides as regards the correctness and applicability of the views that I had held in *Modernria*. I should highlight that the views that I had held in that case were in the context of an application for an interlocutory injunction. Here, I am asked to determine both issues with finality as these are now arising under a joint application under O. 14A of the Rules of Court 2012. It is clear that the first issue in this case is the same issue that came up in *Modernria*. However, the second issue was not considered in that case.

[79] I have considered all the submissions that were made in this case and having given the matter my utmost consideration, I find no reason to depart from the views that I had held in the *Modernria* case.

[80] I shall reproduce herein, the views that I had held in that case in relation to the first issue, which leads to the result that once the impugned meter has been replaced and the offence under s. 37 of the Act is no longer extant, then there is no power to issue the notice to disconnect as the act of replacing the impugned meter with a new meter had brought the nefarious conduct or activity to an end and there is no longer a basis or justification for disconnection of electricity as a statutorily prescribed response to an offence under s. 37 of the Act. The relevant paragraphs in *Modernria* which I am adopting for purposes of answering the first issue are as follows:

> [24] Thus the issue that arose for consideration before me was whether s. 38(1) of the Act can be invoked after remedial work had been carried out by TNB where a new meter has been installed and the theft of electricity has been abated. In this regard, counsel for TNB said that once an offence under s. 37(1) of the Act has been established, TNB is entitled at any time thereafter to issue a 24 hours notice and proceed to disconnect the supply of electricity regardless of the fact that a new meter has been installed and regardless of the fact that there is no longer any continuation or perpetuation of theft of electricity.
>
> [25] Thus, if counsel for TNB is right, then the consumer whose meter has been replaced, is at risk at any time after the event of discovery of the offence, of having the supply of electricity disconnected. This is a curious position for TNB to take because it means than even though they have replaced the tampered meter with a new meter and the usage of

electricity consumption is being properly recorded, TNB could at any time thereafter (ie, weeks and months or years later) invoke s. 38(1) of the Act and predicate it on a previous offence which is no longer being perpetuated. This obviously raises a conundrum but in my view, the answer to the conundrum lies in the decision of the Court of Appeal in *Claybricks & Tiles Sdn Bhd lwn. Tenaga Nasional Bhd* [2006] 4 CLJ 892, where the court held that:

> [8] Kami perlu menyatakan di sini bahawa peruntukan s. 38(1) Akta tersebut adalah jelas dan terang di mana proses mahkamah tidak diperlukan untuk menentukan samada sesuatu kesalahan telah dilakukan sebelum tindakan di bawah seksyen tersebut boleh diambil. Sekiranya proses pembuktian kesalahan melalui mahkamah diperlukan ianya akan mengambil masa yang lama sebelum kuasa di bawah s. 38(1) dapat digunakan. Kami berpendapat s. 38(1) Akta tersebut telah diperuntukkan secara spesifik untuk menjaga kepentingan TNB dan membolehkan TNB bertindak cepat dan dengan itu dapat mencegah penyalahgunaan seperti pencurian bekalan elektrik yang dibekalkan oleh TNB. Jika badan perundangan berniat bahawa pembuktian kesalahan melalui mahkamah diperlukan sebelum kuasa di bawah s. 38(1) Akta tersebut dapat digunakan, maka peruntukan yang jelas harus dibuat mengenainya. Bagaimanapun tiada peruntukan seperti itu dibuat. Adalah pandangan kami tafsiran yang cuba diketengahkan oleh peguam perayu tidak dapat diterima kerana jika mahkamah ini berbuat demikian dengan memasukkan perkataannya sendiri untuk dipakai ke dalam Akta, ianya adalah bertentangan sama sekali dengan segala prinsip pentafsiran statut.

[26] To me the decision of the Federal Court in *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* [2012] 4 CLJ 478; [2012] 4 MLJ 296 which had approved the principle in *Claybricks*' s case also provides the answer to point that has been raised in the present case before me. The relevant passage from the judgment of the Federal Court reads as follows:

> TNB's Section 38 notice to disconnect the electricity supply for offences in s. 37 need not prove the offences in court. The reason is that, any purported act to review such act will defeat the swift enforcement under the Act where electricity supply needs to be severed immediately to avoid further illegal usage by the perpetrator. The nature of the act taken by TNB arose from a commercial obligation on the part of the consumer rather than TNB's obligation under public law.
>
> [8] Zulkefli Ahmad Makinudin JCA also elaborated that Section 38(1) of the Act was enacted to give effective powers to TNB to instantly prevent any offence that may be committed and not to be left unattended or unabated. It provided specifically for the preservation of TNB's interest and empowers TNB to act expeditiously, thereby preventing misuse such as theft of electricity supplied by TNB.

[27] And so, coming back to the issue at hand, the question now is that since the tampering had been rectified by TNB in the sense that they had installed a new meter and presumably there is no longer any tampering, whether TNB can still invoke s. 38(1) of the Act and disconnect the supply of electricity to the said premises based on the fact that some months earlier, an offence under s. 37(1) of the Act had been committed.

[28] In my view, if the offence is continuing, then quite clearly the power under s. 38(1) of the Act can be invoked at any time, regardless of whether it is urgent or not and regardless of whether TNB has proven in criminal proceedings that an offence has been committed. But the situation that presents itself in this case is different. In the present case, the offence under s. 37(1) of the Act is a past offence and not one which is continuing. Here, TNB has admitted that the meter was replaced on 6 June 2014. Also, there is no suggestion of any tampering of the meter since that date. As such, I must proceed on the basis that there has been no tampering after 6 June 2014 and the position since that date is that the amount of electricity consumed at the said premises is being correctly recorded. Hence, this brings me back to the question as to whether TNB may subsequently invoke the power to disconnect under s. 38(1) of the Act in circumstances where there is no longer any tampering or theft of electricity.

[29] In this regard it is clear from the judgment of the Court of Appeal in *Claybricks* (*supra*) and the judgment of the Federal Court in *WRP Asia Pacific* that the power under s. 38(1) of the Act is necessary to ensure that TNB is able to immediately severe electricity supply to avoid further illegal usage by the perpetrator. Quite clearly on the facts of the present case, there is no longer any illegal usage by the consumer such as to warrant the invoking of the power to disconnect under s. 38(1) of the Act. In this regard, it should be emphasised and borne in mind that the power to disconnect the supply of electricity is a power of limited duration and not a power to deprive the consumer of electricity in perpetuity. (See the proviso to s. 38(1) of the Act which allows disconnection for a maximum of three months).

(see pp. 833-835 of the Judgment)

[81] Turning now to the decision of the Court of Appeal and Federal Court in *Claybricks* and *WRP Asia* respectively, it will be observed that both these cases dealt directly with different issues. In *Claybricks*, the issue was whether a conviction for an offence under s. 37 of the Act was a pre-requisite to the exercise of power under s. 38(1) of the Act to disconnect the supply of electricity. In *WRP Asia*, the issue was whether it was open to the consumer to challenge TNB's actions to disconnect the supply of electricity, by way of judicial review.

[82] Whilst it is true that in *Claybricks* and *WRP Asia*, TNB's notices to disconnect and notice of demand (for loss of revenue) were issued after the tampered meter had been replaced and after a lapse of time between the

discovery of meter tampering and issuance of both these notices, and that the courts had upheld these notices, it is equally true that the issues as framed in the present case were not pointedly addressed in both of these cases.

[83] In particular, it does not appear that in both of these cases the court had paused to ask itself whether TNB could exercise such powers under the Act when the offence was no longer in existence. It also does not appear that the courts had subjected the relevant sections of the Act and asked itself whether TNB could lawfully utilise its power of disconnection under s. 38(1) of the Act as a means of extracting payment of the amount that had been recalculated as loss of revenue. As such, the mere fact that the notices issued by TNB were upheld in both of those cases does not in my view, conclude the matter one way or the other.

[84] The next point of significance is the interpretation that is to be placed on s. 38(1) of the Act. Counsel for TNB says, it should be interpreted literally and so long as the pre-requisites are fulfilled, that is, that an offence has been discovered upon inspection and a notice issued by a TNB's employee, then a notice to disconnect issued well after the impugned meter has been replaced with a new meter remains valid although the offence has abated.

[85] In my view, the interpretative process in the present circumstance cannot exclude an examination of the purpose and intent of the statutory provision. Indeed, there seems to be authority to support the purposive approach even in the absence of any ambiguity or conflict of meaning in the words appearing in a statutory provision. (See: *Tenaga Nasional Bhd v. Ong See Teong & Anor* [2010] 2 CLJ 1 (FC) and *Badan Peguam Malaysia v. Datuk Bandar Kuala Lumpur* [2013] 10 CLJ 130 (HC) at p. 139 (paras. 20, 21 and 22).

[86] In any event, in the present context, the very cases which are being relied upon by counsel for TNB, that is *Claybricks* and *WRP Asia*, have both interpreted s. 38(1) of the Act as being a source of statutory power to enable TNB to swiftly take action to prevent the continuation of an offence under s. 37(1) of the Act. It is in my view implicit from the judgments in both cases that the courts had arrived at these conclusions based on a purposive interpretation of s. 38(1) of the Act.

[87] On that basis, I am impelled to the view that the suggestion by counsel for TNB that I should adopt a literal approach to the words appearing in s. 38(1) of the Act would fly in the face of the interpretation which had already been rendered by the Court of Appeal and Federal Court respectively in those two cases.

[88] I am of the view that the interpretation rendered by the courts in *Claybricks* and *WRP Asia* as to the purpose of the power in s. 38(1) of the Act is completely in tandem with the objective of that section which is to enable TNB to swiftly curb an offence which is continuing or which is still extant. The key issue here is whether the power to disconnect can be exercised by TNB when the offence has already abated due to TNB's own standard

procedure of replacing the tampered meter with the new meter. I had previously answered this issue in the negative and had given my reasons in *Modernria* for arriving at such a conclusion. I find nothing in the arguments presented in this case which impels me to take a different view. Hence, I am maintaining the view that I had taken in *Modernria*. In the result, the first issue is answered in favour of the plaintiffs.

[89] The second issue pertains to the issuance of the notice of demand under s. 38(3) of the Act. Section 38(3) of the Act states that:

> (3) The licensee may require the consumer to pay him for the loss of revenue due to an offence committed under subsections 37(1), (3) and (14) and any expenses incurred by the licensee under this section including expenses incurred in respect of the reconnection of electricity supply.
>
> (4) A written statement by an employee of the licensee duly certified by the licensee or any person authorised by the licensee specifying-
>
> (a) the amount of loss of revenue or the expenses incurred by the licensee; and
>
> (b) the person liable for the payment thereof,
>
> shall be *prima facie* evidence of the payment that has to be made by the consumer under subsection (3).

[90] In this regard, it is important to consider sub-s. (5) of s. 38 of the Act which states that:

> (5) The amount stated in the written statement shall, within the period specified in the statement, be due and payable to the licensee and in default of payment such amount **shall be recoverable by civil action in a court.**
>
> (emphasis added)

[91] It is clear that TNB's recourse for recovery of loss of revenue is by way of civil action. As such, looking at these statutory provisions, I find nothing in them that allows TNB to utilise the power of disconnection under s. 38(1) of the Act as a means to demand for payment of the amount which constitutes loss of revenue. If the loss of revenue is to be recovered, then that should be pursued by way of civil action in court in the ordinary way.

[92] Thus, it is clear that the route that was taken by TNB to issue the notice of demand and demanding payment and threatening to disconnect the supply of electricity which is a statutory power under s. 38(1) of the Act, was not one which is permitted by the provisions of the Act. As such, the notice of demand, to the extent that it threatened the plaintiffs with disconnection of electricity in the event of non-payment was bad in law. For those reasons, the second issue is also answered in favour of the plaintiffs.

[93] Before I conclude, I should state that there are no easy or ready answers to the practical issues or challenges that TNB faces such as non-permanent tampering of meter installations, which by its very nature would be impossible to detect. However, the practicalities or difficulties in detecting or preventing theft of electricity alluded to by counsel for TNB cannot be a basis for giving the statutory provisions an interpretation which suits the practical and operational needs of TNB as that would be akin to sacrificing proper principles of statutory interpretation at the altar of expediency or convenience. In my view, the answer to the conundrum created by nefarious activity such as non-permanent meter tampering lies in legislative amendment to s. 38(1) of the Act.

The Outcome

[94] Consequently, for the reasons discussed above, the plaintiffs' claim is allowed with costs of RM15,000 and the defendant's counterclaim is dismissed with no order as to costs.